United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR PETITIONER AND JOINT APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,828

YIU FONG CHEUNG,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION TO REVIEW DEPORTATION ORDER OF BOARD OF IMMIGRATION APPEALS

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Warner Building
Washington, D.C.
Attorney for Petitioner

Washington, D. C. - THIEL PRESS - 202 - 393-0625

QUESTIONS PRESENTED

1. Whether a motion of petitioner alleging under oath that he did not intelligently waive counsel and that he was not provided with a competent interpreter in his own native dialect at his deportation hearing raised an issue which should have been resolved at an evidentiary administrative hearing.

2. Whether petitioner who was arrested on November 16, 1967, without a warrant in Richmond, Virginia, brought to Washington, D.C., detained overnight and on the following day given thirty minutes notice of charges and of his deportation hearing was accorded reasonable notice and due process.

3. Whether thirty minutes notice of a deportation hearing is reasonable where regulations, 8 C.F.R. 242.1(b) (1967 Ed.) prescribe seven days' notice except "where the issuing officer, in his discretion, believes that the public interest, safety, or security "so requires"? May the seven days' notice of hearing be avoided without findings by the issuing officer that the public interest, safety, or security require such dispensation?

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,828

YIU FONG CHEUNG,

Petitioner,

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IMMIGRATION AND NATURALIZATION SERVICE,

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BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This is a petition filed pursuant to 8 U.S.C. 1105(a), 75 Stat. 651, to review a final order dated April 9, 1968, of the Board of Immigration Appeals denying petitioner's motion for reopening of his deportation proceeding. This petition for review was filed on April 16, 1968.

STATEMENT OF THE CASE

Petitioner is a native of Shanghai, China, who came to the United States as a crewman on April 26, 1967, and thereafter overstayed the twenty-nine day period for which he was admitted (J.A. 4). He resides in Richmond, Virginia, where he was arrested without a warrant by immigration officials on November 16, 1967. He was then brought to Washington, D.C., detained overnight, served with a warrant of arrest and order to show cause on November 17, 1967, at 1:35 p.m., and accorded a deportation hearing thirty minutes later (J.A. 8).

At his deportation hearing, Dale Barnes acted as interpreter. The Special Inquiry Officer noted that he was the official interpreter in the Chinese language[1] (Tr. 1). Barnes stated for the record that petitioner and he understood each other (Tr. 1). Petitioner never acknowledged that he understood Barnes. After advice by the Special Inquiry Officer that the Government does not provide a lawyer, that he would have to get one through his own efforts and that he was not required to have a lawyer, petitioner is alleged to have stated through Barnes that "I will proceed without a lawyer"[2] (Tr. 2). Petitioner was ordered to leave the country with an alternative order of deportation to Hong Kong if he did not depart as required (J.A. 5).

Thereafter, petitioner retained counsel and moved to reopen his deportation case alleging that he was effectively denied an opportunity to seek counsel and that he did not

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[1] Dale Barnes is an employee of the State Department. Beginning on September 17, 1967, his services have been used by the Washington, D.C. immigration office as interpreter in Chinese cases. It is submitted that he has no official post as interpreter in the Immigration Service and that he had only a few months experience at the time of this deportation hearing.

[2] This was obviously the words of the interpreter and not those of petitioner.

intelligently waive counsel. He asserted that he was illegally arrested without a warrant (J.A. 8) and that he was not provided with a competent interpreter in his native dialect[3] (Shanghai) at his deportation hearing (J.A. 8).

The Special Inquiry Officer denied the motion without a hearing, stating:

> "I observed the respondent and the official interpreter who served at this hearing. They conversed with other fluently in the Chinese language and with no apparent difficulty." (J.A. 6)

Upon appeal, the Board of Immigration Appeals held:

> "The record contains nothing to show that the alien did not understand the interpreter assigned at the hearing, nor that he did not understand that he was entitled to be represented by counsel, nor that he did not voluntarily and intelligently choose not to be represented by counsel at the hearing. Nothing was offered in the motion or in this appeal to give substance to respondent's allegations. Accordingly, we will dismiss the appeal." (J.A. 4)

This petition for review followed.

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[3]Prior to this case it was the practice in the Washington, D.C., District Immigration Office to use a Mandarin interpreter for natives of northern China and a Cantonese interpreter for those from southern China. This is still the practice in other districts. There are many Chinese dialects and it is doubtful that a person speaking the Shanghai or Cantonese dialects would understand Mandarin. See *Gunther, Inside Asia* (1939), p. 156; V *Encyclopedia Britannica* (1960), p. 569. In another deportation hearing Dale Barnes is listed as speaking the Mandarin rather than the Shanghai or Cantonese dialect. *Matter of Chen Shin Ding*, A15 759 498. By brief and in oral argument before the Board of Immigration Appeals it was specifically contended that Barnes spoke Mandarin and petitioner spoke the Shanghai or Cantonese dialects.

STATUTES AND REGULATIONS

Section 242(b) of the Immigration and Nationality Act [8 U.S.C. 1252(b)] provides in part:

> "Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that–
>
> "(1) the alien shall be given notice, reasonable under all the circumstances of the nature of the charges against him and of the time and place at which the proceedings will be held."

8 C.F.R. 242.1 (1967 Ed.) provides in part:

> "(b) *Statement of nature of proceedings.* The order to show cause will contain a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the acts or conduct alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated. The order will require the respondent to show cause why he should not be deported. The order will call upon the respondent to appear before a special inquiry officer for hearing at a time and place stated in the order, not less than seven days after the service of such order, except that where the issuing officer, in his discretion, believes that the public interest, safety, or security so requires, he may provide in the order for a shorter period. The issuing officer may, in his discretion, fix a shorter period in any other case at the request of and for the convenience of the respondent."

8 C.F.R. 242.12 (1967 Ed.) provides:

> "Any person acting as interpreter in a hearing under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the Service, in which event no such oath shall be required."

STATEMENT OF POINTS

Petitioner relies upon the following points in connection with his petition to review his deportation order herein:

1. It was error to deny petitioner's motion to reopen without an evidentiary hearing.

2. It was error to rule that allegations under oath by petitioner that he did not intelligently waive counsel and that he was not provided with a competent interpreter in his own language at his deportation hearing did not raise issues triable at an evidentiary hearing.

3. It was error to rule that petitioner was accorded a due process hearing on this record.

SUMMARY OF ARGUMENT

Petitioner may not be deported without according him a hearing conforming to due process. *Sung v. McGrath*, 339 U.S. 33 (1950). If he was not provided with a competent interpreter in his own dialect, *Ponce v. McGrath*, 91 F. Supp. 23 (S.D. Calif. 1950); *Nieto v. McGrath*, 108 F. Supp. 150, 154 (S.D. Texas 1951), he did not intelligently and competently waive counsel and the deportation order herein lacks validity. *Handlovitz v. Adcock*, 80 F. Supp. 425 (E.D. Mich 1948).

The allegation by petitioner under oath in a motion to reopen that he was not provided with a competent interpreter in his native dialect and did not intelligently waive counsel in a deportation hearing scheduled upon thirty minutes notice raises a triable issue which can only be resolved at an evidentiary hearing. See *Townsend v. Sain*, 372 U.S. 298, 318 (1963); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1953); *United States v. Morgan*, 346 U.S. 502 (1954); *United States v. Hayman*, 342 U.S. 205, 223 (1953). It was error to resolve this issue without such a hearing. By statute, 8 U.S.C. 1252(b) and by due process, petitioner was entitled to reasonable advance notice of his

deportation hearing. By regulation he was entitled to seven days notice, 8 C.F.R. 242.1(b) (1967 Ed.). On this record he was denied such notice and due process.

Petitioner's arrest without a warrant was illegal and the extent to which such illegality infected his case should be explored administratively.

ARGUMENT

I

PETITIONER'S CLAIM THAT HE DID NOT HAVE A COMPETENT INTERPRETER IN HIS OWN DIALECT AND THEREFORE DID NOT INTELLIGENTLY AND COMPETENTLY WAIVE COUNSEL RAISED A TRIABLE ISSUE REQUIRING AN EVIDENTIARY HEARING

Petitioner asserts in his motion to reopen and in affidavit form that he did not have a competent interpreter in his own dialect and that he, therefore, did not intelligently and competently waive counsel (J.A. 8). He also contends that his deportation hearing scheduled after an illegal arrest and thirty minutes notice denied him an opportunity to obtain counsel. (*Infra*, Point II.)

Dale Barnes of the State Department, a mandarin interpreter (see file of Chen Shin Ding, A15 759 498), who prior to September 18, 1967, had no experience as an immigration interpreter, was used as "official interpreter" herein. The record shows that Barnes was not sworn to translate accurately in conformity with 8 C.F.R. 242.12 (1967 Ed.). The record does not reflect what dialect was utilized. The petitioner does not speak the mandarin dialect. He was born in Shanghai. The record does not reflect any statement by petitioner that he understood the interpreter, only a claim by the interpreter that they understood each other (Tr. 1).

The failure to provide proper interpreters has been the subject of judicial comment, particularly in Chinese and Mexican cases. *Ponce v. McGrath*, 91 F. Supp. 23 (S.D.

Calif. 1950); *Nieto v. McGrath*, 108 F. Supp. 150, 154 (S.D. Texas 1951). Without a competent interpreter in his own dialect, it is clear that petitioner did not intelligently waive counsel. See: *Handlovitz v. Adcock*, 80 F. Supp. 425 (E.D. Mich. 1948).

When the motion to reopen put these matters in issue they should have been resolved by a hearing and evidence. In habeas corpus proceedings, *Townsend v. Sain*, 372 U.S. 298, 318 (1963); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1953); in coram nobis proceedings, *United States v. Morgan*, 346 U.S. 502 (1954), and in proceedings under 28 U.S.C. 1255, *United States v. Hayman*, 342 U.S. 205, 223 (1952), where a triable issue is raised by the pleadings an evidentiary hearing is required. Here, an evidentiary hearing was clearly required. The Special Inquiry Officer erred in resolving the issues raised upon the pleadings. He was in no position to decide whether the interpreter was competent or whether an intelligent waiver was made. Moreover, it should be noted that a heavy burden rests upon the Government to prove that a person in custody knowingly and intelligently waived counsel. *United States v. Hayes*, 385 F.2d 375 (4th Cir. 1967). That burden is not met without a hearing and full inquiry into all relevant facts.

II

PETITIONER WAS DENIED REASONABLE NOTICE OF HEARING

An alien is entitled to procedural due process. *Sung v. McGrath*, 339 U.S. 33 (1950). 8 U.S.C. 1252(b)(i) requires that an "alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him". This is a requirement of the statute and of due process. *Ex parte Woo Wah Ning*, 67 F. Supp. 56 (W.D. Wash. 1946).

The regulation, 8 C.F.R. 242.1(b) (1967 Ed), requires not less than seven days notice except that "where the issuing officer, in his discretion, believes that the public interest,

safety, or security so requires, he may provide" for a shorter period. The alien may request a shorter period. Here, no such request was made.

No finding or statement was made here that the public interest, safety or security required the 30 minute notice of hearing given petitioner herein. On the contrary, no such emergency was presented. The regulations have the force and effect of law. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1953). Findings were necessary here to show the basis for depriving petitioner of the normal seven day notice requirement, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-169 (1962); *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943); *Wingo v. Washington*, __ U.S. App. D.C. __, __ F.2d __ (No. 21,355, May 2, 1968). None were made.

The circumstances here presented reveal that petitioner was denied reasonable notice required by statute, regulations and due process.

III

PETITIONER'S ARREST WITHOUT A WARRANT WAS ILLEGAL

Petitioner contends that his arrest without a warrant in Richmond on November 16, 1967, was illegal. It is submitted that the extent to which this illegality infected the proceeding herein should be explored administratively in the event of a remand.

CONCLUSION

The deportation order should be set aside and the cause remanded to the Immigration and Naturalization Service for further proceedings.

Respectfully submitted,

JACK WASSERMAN

Warner Building
Washington, D.C.

Attorney for Appellant

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 21828

YIU FONG CHEUNG,
Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

PETITION FOR REVIEW OF DEPORTATION ORDER

1. This is a petition for review of a deportation order pursuant to 8 U.S.C. 1105(a) (Public Law 87-301, 75 Stat. 651).

2. Petitioner is a native of China who entered the United States as a crewman on April 26, 1967.

3. Since August, 1967, petitioner has resided and been employed as a chef in a Chinese restaurant in Richmond, Virginia.

4. On November 16, 1967, petitioner was arrested by agents of respondent without a warrant of arrest at his place of employment in Richmond and transported to Washington, D.C., where he was illegally detained until the following day.

5. That there was no basis for believing that respondent might abscond at the time of his arrest.

6. On November 17, 1967, at 1:35 p.m., he was served with a warrant of arrest and order to show cause in Washington, D.C., and given a deportation hearing at 2:00 p.m. He was directed to leave the United States on or before December 20, 1967, with an alternative order of deportation.

7. Petitioner does not speak English, his arrest in deportation proceedings was illegal, he was not afforded a competent interpreter at his deportation hearing, nor an opportunity to seek counsel, and he did not intelligently waive counsel. His deportation hearing was not in conformity with due process of law.

8. On or about November 30, 1967, a motion to reopen was filed by respondent herein attacking the validity of the deportation hearing accorded him upon the grounds set forth above. Without according him an evidentiary hearing, his motion was denied and upon appeal the denial was affirmed by the Board of Immigration Appeals.

9. The deportation order herein is null and void and contrary to law.

10. The petitioner has exhausted his administrative remedies and no further relief is available to him.

11. Criminal proceedings are not pending against petitioner for violation of 8 U.S.C. 1252(d) or (e).

WHEREFORE, Petitioner prays for an order:

(a) Declaring that the deportation order entered against him is null and void and contrary to law.

(b) Declaring that he was illegally arrested on November 16, 1967, and that the statement and other evidence taken from him during such illegal arrest and the fruits thereof should be suppressed.

(c) Declaring that the petitioner was denied due process at his deportation hearing.

(d) Declaring that petitioner's motion to reopen should have been granted.

(e) Remanding the cause to the Immigration Service for further proceedings.

(f) For such further relief as may be appropriate.

JACK WASSERMAN

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

APR 9 - 1968

File: A-15548648 - Washington, D.C.

In re: YIU FONG CHEUNG

IN DEPORTATION PROCEEDINGS

APPEAL

ORAL ARGUMENT: March 7, 1968

On behalf of respondent: Jack Wasserman, Esq.
902 Warner Building
Washington, D.C. 20004
(Brief filed)

On behalf of I&N Service: Douglas Lillis
Appellate Trial Attorney
(Brief filed)

CHARGES:

Order: Section 241(a)(2), I&N Act (8 USC 1251 (a)(2)) - Crewman - remained longer

Lodged: None

APPLICATION: Reopening of proceedings

This is an appeal from the denial by the special inquiry officer of respondent's motion to reopen the proceedings so that consideration could be given to a plea for termination of proceedings. Respondent contended in the motion that he was effectively denied an opportunity to seek counsel at the time of the deportation hearing and that he did not intelligently waive counsel at his hearing. In addition he contended that he was not provided with a competent interpreter in his own dialect. The special inquiry officer found that the grounds asserted for reopening the proceedings were without merit and the motion for reopening was denied. We will dismiss respondent's appeal from the denial of that motion.

The respondent is a native and citizen of China who entered the United States at Newark, New Jersey as a crewman on or about April 26, 1967 and was authorized to remain in the United States for a period of time not to exceed 29 days. He remained beyond that time and at the hearing on November 17, 1967 respondent admitted the allegations of fact contained in the Order to Show Cause and also conceded deportability on the charge contained in the Order to Show Cause. Deportability was established by evidence that was clear, unequivocal and convincing. Indeed, in both respondent's appeal and in the motion previously filed it was not alleged that respondent was not deportable as charged.

The record contains nothing to show that the alien did not understand the interpreter assigned at the hearing, nor that he did not understand that he was entitled to be represented by counsel, nor that he did not voluntarily and intelligently choose not to be represented by counsel at the hearing. Nothing was offered in the motion or in this appeal to give substance to respondent's allegations. Accordingly, we will dismiss the appeal.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Acting Chairman

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

6 DEC 1967

File: A15 548 648 - Washington, D.C.

In The Matter Of	)	
YIU, FONG CHEUNG	)	IN DEPORTATION PROCEEDINGS
	)	
Respondent	)	

CHARGE:

I & N Act - Section 241(a)(2) - Crewman, remained longer

APPLICATION:

Motion to Reopen

IN BEHALF OF RESPONDENT:	IN BEHALF OF SERVICE:
Jack Wasserman, Esquire 902 Warner Building Washington, D.C. 20004	John Putman Acting Trial Attorney Washington, D.C.

DECISION OF THE SPECIAL INQUIRY OFFICER

Respondent is a native and citizen of China who entered the United States at Newark, New Jersey on or about April 26, 1967, as a crewman. He was authorized to remain in the United States while his vessel remained in port, not to exceed 29 days, but remained more than 29 days without authority. At a hearing on November 17, 1967, respondent admitted these facts and conceded deportability on the charge contained in the Order to Show Cause. An order was entered granting voluntary departure, with an alternative order of deportation to Hong Kong.

On December 1, 1967, respondent, through counsel, moved to reopen the proceedings. The Motion to Reopen contends that the respondent, "was effectively denied an opportunity to seek counsel and he contends that he did not intelligently

waive counsel at his deportation hearing. In addition, he asserts that he was not provided with a competent interpreter in his own dialect."

At the hearing respondent was advised that he had the right to be represented by a lawyer if he so desired; and that he was not required to have a lawyer but could proceed by himself if he so desired. He was asked, "What do you wish to do?" He replied, "I will proceed without a lawyer." I consider this to be an intelligent waiver of counsel.

Respondent contends that he was not provided with a competent interpreter in his own dialect at the hearing. I observed the respondent and the official interpreter who served at this hearing. They conversed with each other fluently in the Chinese language and with no apparent difficulty. The respondent at the hearing raised no question about the interpreter, nor did he indicate at any time that he and the interpreter had difficulty in understanding each other.

It may be noted, also, that the Motion to Reopen does not deny the accuracy of any of the allegations of fact in the Order to Show Cause, nor does it deny deportability as charged therein.

I find that the grounds urged for reopening of the proceedings in this case are without merit, and the motion for reopening will be denied.

ORDER: IT IS ORDERED that the Motion to Reopen the proceedings be, and it is hereby denied.

/s/ Herman L. Bookford

Herman L. Bookford
Special Inquiry Officer

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

IN THE MATTER OF	)
YIU FONG CHEUNG	)
A15 759 511	)
IN DEPORTATION PROCEEDINGS	)

MOTION FOR REOPENING

Comes now the respondent herein and on the basis of the attached affidavit of Yiu Fong Cheung moves for reopening of the deportation proceedings herein.

The respondent was effectively denied an opportunity to seek counsel and he contends that he did not intelligently waive counsel at his deportation hearing. In addition, he asserts that he was not provided with a competent interpreter in his own dialect.

In view of the foregoing, request is respectfully made for reopening of the deportation proceeding herein so that respondent may be afforded a due process hearing so that he may be represented by counsel and have an acceptable interpreter.

JACK WASSERMAN
Attorney for Respondent

AFFIDAVIT

CITY OF RICHMOND)
) SS:
COMMONWEALTH OF VIRGINIA)

YIU FONG CHEUNG, being duly sworn on oath according to law, deposes and says:

1. I reside at 2 Mulberry Street, Richmond, Virginia, and I am the respondent herein.

2. On November 16, 1967, I was arrested in Richmond, Virginia, by the Immigration and Naturalization Service, brought to Washington, D.C., detained overnight and served with a warrant of arrest and an order to show cause at 1:35 p.m. on November 17, 1967. Thereafter, I was accorded a hearing at 2:00 p.m. on November 17, 1967. I was not accorded sufficient time to engage an attorney nor was I provided with a competent interpreter either at the Immigration Service or at my immigration hearing.

3. My detention was not based upon the fact that I might abscond but merely the fact that I was alleged to be an alien crewman and my arrest and detention in this proceeding was illegal and contrary to the Fourth Amendment.

4. I did not intelligently waive counsel at the deportation hearing herein nor was I proved with a competent interpreter in my native dialect.

5. I have now retained counsel and I desire that my hearing be reopened so that I may be accorded a proper due process hearing.

[Jurat dated November 28, 1967.]

ISSUE PRESENTED

On this petition for judicial review of a deportation order pursuant to Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a the question is:

> Whether the administrative authorities abused their discretion in denying petitioner's motion to reopen his deportation hearing.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,828

YIU FONG CHEUNG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

On Petition to Review Deportation Order of Board of Immigration Appeals

---

BRIEF AND APPENDIX FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

This is a petition for judicial review of a deportation order. Under Section 106(a)(4) of the Immigration and Nationality Act, as amended 8 U.S.C. 1105a(a)(4), the petition is to be determined solely on the administrative record. Petitioner does not dispute that he is deportable, but challenges the denial of a motion to reopen the deportation proceedings.

The Facts

The petitioner is a native and citizen of China who arrived at Newark, New Jersey on April 26, 1967 as a

crewman on the vessel "HONG KONG TRANSPORT" and was permitted to enter the United States as a nonimmigrant crewman for a period not to exceed 29 days. (RA 5.)[1]

On November 16, 1967 he was arrested in Richmond, Virginia by an officer of the Immigration and Naturalization Service and brought to Washington, D. C., where he was detained over night. The following day at 1:35 p.m. he was served with a warrant of arrest and an order to show cause issued by the District Director of the Immigration and Naturalization Service at Washington, D. C. (JA 8; RA 9.)[2]

At approximately 2:00 p.m. he appeared before a Special Inquiry Officer of the Immigration and Naturalization Service to respond to an order to show cause which charged petitioner with being deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), in that after admission as a nonimmigrant crewman under section 101(a)(15) of the said Act, 8 U.S.C. 1182(a)(15), he had remained in the United States for a longer period of time than permitted. Present at the hearing was one Dale Barnes, an employee of the State Department, who acted as official interpreter. Mr. Barnes conversed with the petitioner and advised the Special Inquiry Officer that they understood each other. The Special Inquiry Officer then advised the petitioner that he had the right to be represented at the hearing by counsel of his own choice. Petitioner elected to proceed without counsel. He then admitted that after entering as a seaman he remained longer than permitted under the immigration law and that he was then illegally in the United States. The Special Inquiry Officer found petitioner deportable and granted him the only relief from deportation available to him, voluntary departure in lieu of deportation. (RA 1 to 6.)

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[1] RA references are to appendix to respondent's brief.

[2] JA references are to joint appendix of petitioner's brief.

After the entry of the deportation order against him, petitioner engaged counsel, who filed a motion to reopen with the Special Inquiry Officer, alleging that petitioner did not intelligently waive counsel at the hearing and was not furnished a competent interpreter. (JA 7.) The Special Inquiry Officer denied the motion to reopen, reasoning as follows:

> At the hearing respondent was advised that he had the right to be represented by a lawyer if he so desired; and that he was not required to have a lawyer but could proceed by himself if he so desired. He was asked, "What do you wish to do?" He replied, "I will proceed without a lawyer." I consider this to be an intelligent waiver of counsel.
>
> Respondent contends that he was not provided with a competent interpreter in his own dialect at the hearing. I observed the respondent and the official interpreter who served at this hearing. They conversed with each other fluently in the Chinese language and with no apparent difficulty. The respondent at the hearing raised no question about the interpreter, nor did he indicate at any time that he and the interpreter had difficulty in understanding each other.
>
> It may be noted, also, that the Motion to Reopen does not deny the accuracy of any of the allegations of fact in the Order to Show Cause, nor does it deny deportability as charged therein.
>
> I find that the grounds urged for reopening of the proceedings in this case are without merit, and the motion for reopening will be denied. (JA 6.)

Petitioner appealed from the decision of the Special Inquiry Officer to the Board of Immigration Appeals which dismissed the appeal, stating in part:

> The record contains nothing to show that the alien did not understand the interpreter assigned at the hearing, nor that he did not understand that he was entitled to be represented by counsel, nor that he did

not voluntarily and intelligenty choose not to be represented by counsel at the hearing. Nothing was offered in the motion or in this appeal to give substance to respondent's allegations. Accordingly, we will dismiss the appeal. (JA 4.)

This petition for review of the deportation order was then filed.

STATUTES AND REGULATIONS

The following provisions of the Immigration and Nationality Act are pertinent here:

Section 106(a), 8 U.S.C. 1105a(a). The procedure prescribed by, and all provisions of the Act of December 29, 1950, as amended, (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior act, except that—

* * * *

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole shall be conclusive.

Section 241, 8 U.S.C. 1251.

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * *

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248, or to comply with the conditions of any such status.

Section 287(a), 8 U.S.C. 1357(a). Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

* * * *

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.

Also pertinent are the following regulations:

8 CFR 242.1 (b) *Statement of nature of proceedings.* The order to show cause will contain a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the acts or conduct alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated. The order will require the respondent to show cause why he should not be deported. The order will call upon the respondent to appear before a special inquiry officer for hearing at a time and place stated in the order, not less than seven days, after the service of such order, except that where the issuing officer, in his discretion, believes that the public interest, safety, or security so requires, he may provide in the order for a shorter period. The issuing officer may, in his discretion, fix a shorter period in any other case at the request of and for the convenience of the respondent.

8 CFR 242.2. Apprehension, custody and detention— (a) *Warrant of Arrest.* At the commencement of

any proceeding under this part, or at any time thereafter and up to the time the respondent becomes subject to supervision under the authority contained in section 242(d) of the Act, the respondent may be arrested and taken into custody under the authority of a warrant of arrest. However, such warrant may be issued by no one other than a district director, acting district director, or deputy district director, and then only whenever, in his discretion, it appears that the arrest of the respondent is necessary or desirable.

SUMMARY OF ARGUMENT

The denial of the motion to reopen was within the sound discretion of the administrative agency. Petitioner has failed to show a clear abuse of such discretion.

There was no denial of counsel at the hearing, since petitioner was advised of his right to counsel and chose to proceed without one. The alleged failure to understand the interpreter is completely unsubstantiated. The Special Inquiry Officer observed that petitioner and the interpreter were able to converse fluently in the Chinese language. Furthermore, petitioner has failed to point to any inaccuracy in the deportation record which could be attributed to his inability to understand the interpreter. It was conceded in the deportation hearing (RA 4, 5) and in petitioner's brief (p. 2) that petitioner entered as a seaman in 1967 and overstayed his authorized admission in violation of law.

Petitioner's complaint that he was not given adequate advance notice of his hearing was not raised in the administrative proceedings and petitioner should not be permitted to raise it for the first time on judicial review. If it had been raised during the administrative proceedings the brevity of the notice doubtless could have been explained by the circumstances of petitioner's arrest and incarceration.

ARGUMENT

Administrative authorities did not abuse their discretion in denying petitioner's motion to reopen his deportation hearing.

Petitioner asserts errors and irregularities in his deportation hearing which should have caused the Special Inquiry Officer and the Board of Immigration Appeals to reopen the hearing. The granting of the motion to reopen was discretionary with the administrative authorities, and the courts will not interfere with the administrative exercise of discretion unless there was a clear abuse of this discretion or a clear failure to exercise it. *Adel* v. *Shaughnessy*, 183 F.2d 371, 372 (CA 2, 1950); *Foti* v. *INS*, 375 U.S. 217, 228, 84 S.Ct. 306, 11 L.Ed. 2 281 (1963); *Ng* v. *Pilliod*, 279 F.2d 207, 210 (CA 7, 1960), *cert. denied*, 365 U.S. 860; *MacKay* v. *McAlexander*, 268 F.2d 35, 40 (CA 9, 1959), *cert. denied*, 362 U.S. 961. See 2 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed.), §§ 8.14, 8.15.

Two principal points urged by the petitioner are that he was not given the right to have counsel and was not furnished with a competent interpreter. In fact, he was advised of his right to have counsel at the deportation hearing and chose to proceed without counsel. (RA 2.) Since the record contains this advice and waiver by the petitioner, the alleged error resolves into a contention that he did not understand the interpreter. The Board of Immigration Appeals was not persuaded that petitioner could not converse with the interpreter and agreed with the finding of the Special Inquiry Officer that the interpreter and petitioner understood each other at the hearing. Respondent submits that great weight should be given to the finding of the Special Inquiry Officer because he was in position to view both the interpreter and petitioner and any inability on their part to converse should have been clearly evident to the Special Inquiry Officer.

Moreover, petitioner himself has never alleged that he failed to understand the interpreter. (JA 8.) Furthermore petitioner has not pointed to any inaccuracy in the facts developed in the hearing by questioning through the interpreter. The only facts material to the petitioner's deportability were that he, admitted temporarily as an alien crewman, jumped ship in 1967, and thereafter remained in the United States illegally. These facts are conceded on page two of petitioner's brief.

Also urged as errors are that the interpreter was not placed under oath and that petitioner was not given seven days advance notice of his hearing as required by regulations. Neither of these procedural objections was raised during the administrative proceedings and they should therefore not be considered by this court because of the petitioner's failure to exhaust his administrative remedies. Section 106(c) of the Immigration and Nationality Act, 8 U.S.C. 1105a(c); *Unemployment Compensation Commission of Territory of Alaska* v. *Aragon*, 329 U.S. 143, 155 (1946); *U. S.* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 73 S.Ct. 67, 97 L.Ed. 54 (1952); *Beck* v. *Neelly*, 202 F.2d 221 (CA 7, 1953), *cert. denied*, 345 U.S. 997; *Si* v. *Boyd*, 243 F.2d 203 (CA 9, 1957); *Sharaiha* v. *Hoy*, 169 F.Supp. 598 (S.D.Cal. 1959); *Chew* v. *Boyd*, 309 F.2d 857, 861 (CA 9, 1962); *Vucinic* v. *U.S.I.N.S.*, 243 F.Supp. 113 (D. Or. 1965). In any event, these were harmless errors which should not cause reversal of an administrative decision. *Sisto* v. *Civil Aeronautics Board*, 86 U.S.App. D.C. 31, 179 F.2d 47 (1949); *Philadelphia Co.* v. *Securities and Exchange Commission*, 85 U.S. App. D.C. 327, 177 F.2d 720 (1949). Since petitioner concededly is a deserting crewman who is in the United States illegally the deportation order against him was unquestionably proper.

8 CFR 242.12 does provide that a person acting as interpreter in a deportation hearing shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the Immigration and Naturalization Service. This exception was placed in the regulations ob-

viously because a government employee is presumed to perform his duties properly in accordance with the oath of his office. The same presumption should extend to an interpreter who is an employee of the State Department.

Moreover, such an officer is in effect an employee of the Service, under Section 103(a) of the Immigration and Nationality Act, 8 U.S.C. 1103(a), which empowers the Attorney General to confer upon any employee of the United States the status and authority of a Service employee.

The record as developed does not support petitioner's contention that there was a departure from 8 CFR 242.1, which provides that an alien shall be given seven days advance notice of his deportation hearing unless a shorter period is requested by him or is determined by the District Director to be required by public interest, safety, or security. Since the point was not raised, the basis of the determination for a prompt hearing is not reflected in the deportation record. As petitioner was under arrest, the early hearing may have resulted from the district director's desire to minimize the period of his incarceration. Moreover, the district director was fulfilling the mandate of Section 287(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(2), that an alien arrested without warrant

> "shall be taken without delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States."

Also there is no showing that petitioner would have benefited by receiving seven days advance notice, since he admittedly had no defense to the deportation charge and was granted the maximum relief available to him, voluntary departure in lieu of deportation.

Petitioner also argues that his arrest without a warrant was illegal. The record is bare of any evidence to support this argument, and his brief cites none. Section 287(a) of the Immigration and Nationality Act, 8 U.S.C.

1357(a), authorizes arrest without warrant of any alien in the United States, if the officer has reason to believe that the alien is illegally in the United States and is likely to abscond before a warrant can be obtained. Even if the arrest has been illegal no evidence was taken in the deportation hearing that resulted from illegal detention. Prior to the hearing a warrant of arrest was issued by the District Director pursuant to 8 CFR 242.2. After this legal arrest he was accorded a deportation hearing and admitted that he was illegally in the United States and subject to deportation. These admissions were made while he was legally detained and cannot be characterized as the "fruit of the poisonous tree". *Klissas* v. *INS*, 124 U.S.App.D.C. 75, 361 F.2d 529 (1965).

CONCLUSION

Respondent submits that the petition for review should be dismissed because the petitioner has failed to show a clear abuse of discretion by the Special Inquiry Officer or the Board of Immigration Appeals in denying his motion to reopen his deportation hearing.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

Of Counsel:

CHARLES GORDON,
General Counsel.

DOUGLAS P. LILLIS,
General Attorney,
Immigration and Naturalization Service.

RA 1

APPENDIX

File No. A15 759 511

UNITED STATES OF AMERICA:

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of

YIU, Fong Cheung

Respondent.

In Deportation Proceedings Under Section 242 of the Immigration and Nationality Act

DECISION OF THE SPECIAL INQUIRY OFFICER

The above-named respondent having appeared before me for hearing on this date, pursuant to the Order to Show Cause in this proceeding, and having admitted that the factual allegations contained therein are true, and having further admitted that (s)he is deportable from the United States on the charges set forth therein, I am satisfied and have concluded that deportability has been thereby established.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government within such time and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States to Hong Kong on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondent into its territory, the respondent shall be deported to ———

Date: Nov 17, 1967

Place: Wash D.C.

J H Bookford
(Special Inquiry Officer)

Copy of this decision has been served on the respondent.

Appeal: Waived—~~Reserved~~

J H Bookford
(Special Inquiry Officer)

Form I-39
(Rev. 8-10-64)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964—748-849

RA 2

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

MATTER OF

YIU FONG CHEUNG

FILE A15 548 648

IN DEPORTATION PROCEEDINGS

TRANSCRIPT OF HEARING

Before Special Inquiry Officer Herman L. Bookford

Hearing held on November 17, 1967 at Washington, D. C.

Recorded by Continuous Recorder Transcribed by Nancy Stevenson

Official Interpreter Dale Barnes Language Chinese

IN BEHALF OF SERVICE:

John E. Putnam, Acting
Trial Attorney

Washington, D. C.
Station

IN BEHALF OF RESPONDENT:

No one

I hereby certify that to the best of my knowledge and belief the following pages numbered 1 through 6 are a complete and accurate transcript of the above-described hearing.

Signature
Special Inquiry Officer
Title
1-5-68
Date

Form I-397
(Rev. 3-25-65)

GPO 889-439

A15 548 648

THE SPECIAL INQUIRY OFFICER:

This is a deportation hearing in the case of Yiu, Fong Cheung, file A15 548 648. The hearing is at Washington, D. C., November 17, 1967, before Special Inquiry Officer Herman L. Bookford. Also present are Acting Trial Attorney John Putnam and the official interpreter in the Chinese language, Dale Barnes.

Mr. Barnes, have you conversed with this respondent as yet?

MR. BARNES:

Yes, I have.

THE SPECIAL INQUIRY OFFICER:

And do you understand each other?

MR. BARNES:

We do.

THE SPECIAL INQUIRY OFFICER:

All right. The hearing will be conducted through the interpreter. Mr. Yiu, the reason for this hearing is that the Government has issued a paper in your case called an Order to Show Cause, and this paper says that you are illegally in the United States at this time because after you came in as a crewman, you stayed longer than you were authorized to stay. The purpose of the hearing is to decide whether this is true and if true whether you should be deported or whether there is some other way that your case may be handled.

Q Now, do you understand?

A I understand.

THE SPECIAL INQUIRY OFFICER:

You have the right to be represented at this hearing by a lawyer if you so desire. The Government does not furnish a lawyer for you in these cases, and if you do wish

to have anyone represent you, it must be someone that you obtain yourself. You are not required to have a lawyer; it is not compulsory and you may go ahead by yourself and speak for yourself if you wish.

Q Now, what do you wish to do?

A I will proceed without a lawyer.

You will have the right, Mr. Yiu, to examine any papers that Mr. Putnam here, who represents the Service, may offer for the record in your case, and the right to object to anything you think is improper. Also you may offer any evidence you wish for yourself and make any statements you may wish to make for yourself.

Q Do you understand?

A I understand.

Please stand up to be sworn, Mr. Yiu, and raise your right hand (complies)

Q Do you solemnly swear that all the statements you will make in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A I do.

Please be seated.

Q What is your full, correct name?

A Yiu Fong Cheung.

THE SPECIAL INQUIRY OFFICER:

All right.

Q Now, Mr. Yiu, you have already received a copy of this paper, have you not, the Order to Show Cause? Oh, I see that you have it with you. I see that you have received a copy. The original is entered in the record as Exhibit 1. The first statement in this paper is that you are not a citizen or national of the United States. Is this a true statement?

A Correct. I am not a citizen of the United States.

Q Number two is that you are a native of China and a citizen of China, is this true?

A Correct.

Q Number three, you entered the United States at Newark, New Jersey on or about April 26, 1967. Is this true?

A Correct.

Q Number four, at that time you were admitted as a crewman aboard the vessel "Hong Kong Transport" and were authorized to remain in the United States for the period of time the "Hong Kong Transport" remained in port not to exceed 29 days. Is this true?

A That is correct.

Q Number five, you have remained in the United States more than 29 days without authority. Is this true?

A Correct.

THE SPECIAL INQUIRY OFFICER:

Q It is charged that you are illegally in the United States at this time. Under the law as a person who has remained longer than permitted. Is that correct?

A Correct.

Q Do you wish to apply for voluntary departure which would mean that you would leave the United States without expense to the United States Government?

A Yes.

All right. Mr. Putnam, will you question the respondent, please.

BY MR. PUTNAM:

Q Were you ever arrested in the United States or in any other country for a crime?

A I have never been arrested for any crime.

Q Have you ever committed any crime in any country for which you were never arrested?

A No.

Q Were you ever deported or ever excluded from admission into the United States?

A No.

Q Do you have sufficient funds or could you arrange to receive sufficient funds to defray the cost of the ex-

pense for you to leave this country and return to your homeland or some other foreign country?

A Yes, I have.

THE SPECIAL INQUIRY OFFICER:

Q Have you ever been involved in the Communist Party, Mr. Yiu?

A No, I have never been.

Q If it should become necessary actually to deport you, to what country would you wish to go?

A Hong Kong.

All right. Does the Government wish any other designation, Mr. Putnam?

MR. PUTNAM:

No.

THE SPECIAL INQUIRY OFFICER:

I'm entering an order at this time which grants you the privilege of voluntary departure, Mr. Yiu, and this means that you will not be deported as long as you leave the United States voluntarily within the time and under the conditions fixed by the District Director. Now, if you should change your mind and refuse to leave, there would then be effective in your case, without any further proceedings, an order for your deportation to Hong Kong.

Q Now, do you understand this decision?

A I understand.

Q Are you satisfied with this decision, Mr. Yiu?

A I am satisfied.

Does the Government waive, Mr. Putnam?

MR. PUTNAM:

Yes.

THE SPECIAL INQUIRY OFFICER:

All right. The decision is final. I will give you a copy of the decision at this time. The hearing is closed.

HEARING IS CLOSED

RA 7

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of)
)
YIU FONG CHEUNG)
) Respondent.)

To: Yiu Fong Cheung
2 Mulberry Street
Richmond, Virginia
Address (number, street, city, state, and ZIP code)

File No. A15 759 511

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of China
and a citizen of China;
3. You entered the United States at Newark, New Jersey on or about April 26, 1967;
4. At that time you were admitted as crewman aboard the vessel HONG KONG TRANSPORT and were authorized to remain in the United States for the period of time the HONG KONG TRANSPORT remained in port, not to exceed 29 days;
5. You have remained in the United States more than 29 days, without authority;

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Section 101(a)(15) of said act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at Room 806, 1025 Vermont Ave., N. W., Washington, D. C. on November 17, 1967, at 2:00 Pm, and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: November 17, 1967

IMMIGRATION AND NATURALIZATION SERVICE

Lewis D. Barton
(signature and title of issuing officer)

LEWIS D. BARTON
District Director, Washington, D. C.
(City and State)

Form I-221
(Rev. 3-30-67)

Exhibit

(over)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 315928 95